Supreme Court, U. S.
FILED
OCT 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-448

NOSH CAMAJ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
GERALD M. LABUSH
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Introduction	2
Point I—Camaj contends that the prosecutor failed to disclose exculpatory evidence. He has failed to demonstrate this contention	3
Point II—Camaj contends that the trial court erroneously denied his motion to dismiss the indictment for lack of a speedy trial. However, he does not demonstrate that the decision below, with respect to this contention, rested upon federal grounds. He has thus failed to show that this Court has jurisdiction to review the state court's decision, and his petition should be denied. In any event, Camaj's contention under federal law does not warrant review by this Court	5
A. Camaj has failed to establish this Court's jurisdiction	5
B. Camaj's contention does not warrant review by this Court	8
Point III—Camaj's claims that the trial court erroneously failed to dismiss the indictment because of the absence of evidence corroborating the "accomplice" testimony does not involve a federal question	9
Conclusion	9

TABLE OF AUTHORITIES

Cases: PAGE

Barker v. Wingo, 407 U.S. 514 (1972) 6, 8

Durley v. Mayo, 351 U.S. 277 (1956) 5, 6

Henry v. Mississippi, 379 U.S. 443 (1965) 7

Klinger v. Missouri, 13 Wall. 257 (1871) 5

Memphis Natural Gas v. Beeler, 315 U.S. 649 (1942) 5

People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817, remittitur amended 24 N.Y.2d 914, 301 N.Y.S. 2d 644, *cert. denied,* 396 U.S. 846 (1969) 7

Stembridge v. Georgia, 343 U.S. 541 (1952) 5, 7

Other Authorities:

New York Civil Practice Laws and Rules
Rule 5524 7

New York Criminal Procedure Law (McKinney's)
Section 60.22(1) 9

Supreme Court Rules
Rule 23(1)(c), 298 U.S. 1035 6

22 New York Codes, Rules and Regulations
Section 600.10(b)(1)(iii) 6–7
Section 600.10(d)(2)(iii) 7

28 U.S.S.
Section 1254(1) 5n
Section 1257(3) 5n

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-448

NOSH CAMAJ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Nosh Camaj seeks a writ of certiorari to review an order of the New York State Appellate Division, First Department, entered May 13, 1975. *People* v. *Camaj,* —— A.D.2d —— (1st Dept. 1975). The order of the Appellate Division unanimously affirmed, without opinion, Camaj's conviction in the Supreme Court of New York County of MURDER (N.Y. Penal Law §125.25). Following his conviction, Camaj was sentenced, on June 7, 1974, to a term of imprisonment of 15 years to life.

On June 23, 1975, the New York State Court of Appeals issued a certificate denying Camaj permission to appeal.

Introduction

For several months, Nosh Camaj plotted to kill Alfred Stubbla. Camaj's motive was revenge. He blamed Stubbla for the murder of his brother, Stephen. On March 14, 1972, Stubbla was lured to a Manhattan restaurant by Camaj's girl friend, Johanna Leonardi. When Stubbla left the restaurant, Camaj, along with his brother and cousin, was waiting. Camaj ran behind Stubbla, pointed a gun at the back of his head, and shot him three times.

Two passers-by, Patrick Cooney and T. J. Dunne, saw the shooting and notified two policemen. The police caught Leonardi and Camaj's two relatives as they were attempting to flee in a taxicab. Camaj escaped on foot, but he was arrested at his home later that day.

In an indictment filed by the New York County Grand Jury on June 5, 1972, Camaj was charged with the crimes of murder and conspiracy in the first degree. Indictment No. 2900/72.

At the trial Johanna Leonardi testified for the People. Largely based on her testimony, the jury convicted Camaj of murder.* He was sentenced on June 7, 1974, to a term of imprisonment of from fifteen years to life. He is presently serving that sentence.

Camaj appealed unsuccessfully to the Appellate Division. Subsequently, he was denied permission to appeal to the Court of appeals.

* The conspiracy count was not submitted to the jury.

Camaj asks this Court to grant a writ of certiorari to review the decision of the Appellate Division.

He argues that the prosecutor suppressed exculpatory evidence and that he was denied his Sixth Amendment right to a speedy trial. In addition, he contends that the prosecutor failed to meet the requirements of New York's corroboration requirement.

The Appellate Division, in sustaining Camaj's conviction, rejected these claims without comment.

POINT I

Camaj contends that the prosecutor failed to disclose exculpatory evidence. He has failed to demonstrate this contention.

In the instant petition Camaj renews his contention, rejected without comment by the Appellate Division, that the prosecutor withheld the identity of a witness to the murder. This witness, T. J. Dunne, was unable to identify Camaj (or anyone else) in a lineup held some days after the defendant's arrest. Camaj speculates that the "withheld" identity of Dunne woud have provided him with exculpatory evidence. Petition at 11.

In the first place, no evidence was suppressed. Camaj was represented by counsel, Lawrence Barse, at the lineup. Mr. Barse knew that two witnesses viewed the lineup and were unable to identify anyone, including Camaj (Barse:

1603, 1607).* No defense counsel ever asked for the names of these witnesses, but nonetheless it was obvious to all who they were. At the trial, one of the two, Patrick Cooney, testified for the People. On his direct examination he said that he was with Dunne when they heard shots (late at night), saw people running away, and called the police who then caught several of Camaj's companions, but not Camaj (Cooney: 1026-7). Cooney was not asked to, and did not, identify Camaj at the trial.

In the second place, Dunne had no exculpatory evidence to give. Late at night he heard shots and saw people running up the street. It is neither surprising, nor exculpatory, nor even probative, that Dunne could not identify those people and was unable to identify anyone in the lineup. To whatever extent it is even arguable that Dunne's inability to identify Camaj might have helped Camaj, that purpose was served by the testimony of Dunne's companion, Cooney, who testified to precisely the same effect as Dunne would have—that is, that he saw the shooting but could not identify Camaj.

* Numerical references are to the typewritten transcript of the trial filed by the petitioner with the Appellate Division.

POINT II

Camaj contends that the trial court erroneously denied his motion to dismiss the indictment for lack of a speedy trial. However, he does not demonstrate that the decision below, with respect to this contention, rested upon federal grounds. He has thus failed to show that this Court has jurisdiction to review the state court's decision, and his petition should be denied. In any event, Camaj's contention under federal law does not warrant review by this Court.

A. Camaj has failed to establish this Court's jurisdiction.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Durley* v. *Mayo*, 351 U.S. 277, 281-82 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Memphis Natural Gas* v. *Beeler*, 315 U.S. 649, 651 (1942); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871).

Camaj seeks to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257(3). Petition at 3.*

Camaj must demonstrate that the state court judgment which he asks this Court to review rested upon federal

* §1275(3) provides in revelant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States

Petitioner's reference to 28 U.S.C. §1254(1) clearly should have been to §1257(3).

grounds. *See e.g. Durley* v. *Mayo, supra.* To give effect to this requirement, the rules of this Court provide that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court • • •." Supreme Court Rules, Rule 23(1)(c), 398 U.S. 1035.

Camaj has not, and cannot, satisfy this requirement because there is no indication that the state appellate court, in fact, dealt with Camaj's federal claim.

Camaj was indicted on June 5, 1972. On January 7, 1974, 18 months after the indictment, Camaj moved to dismiss the indictment for "lack of a speedy trial." In support of his motion, he cited only the lapse of time since his indictment. He did not allege prejudice; he did not allege that the People or the courts were responsible for the delay; he did not allege that he had demanded a speedy trial.

His motion was denied on February 13, 1974, and his trial commenced six weeks later.

On appeal to the Appellate Division, Camaj argued, as he does to this Court, that the trial court improperly denied his motion to dismiss the indictment. He contended that the delay in this case violated the standards set forth by this Court in *Barker* v. *Wingo,* 407 U.S. 514 (1972). Appellate Division Brief at 7-11. Petition at 22-30.

The People, however, urged that this argument be ignored because Camaj had not properly preserved it for appellate review in accord with applicable state law. 22 New York Codes, Rules and Regulations §§600.10 (b)(1)(iii) and 600.10(d)(2)(iii). Under state law, it is appellant's responsibility to supply the appellate court with a record adequate to determine the issues raised by him. Camaj did not do so. For example, Camaj failed even to supply the Appellate Division with the minutes of those dates on which his case was adjourned. See Respondent's Brief in the Appellate Division, at 13.

The Appellate Division affirmed Camaj's conviction without opinion. The remittitur of the Appellate Division is silent with respect to the grounds upon which its decision rested. Appendix A to the Petition. And Camaj, represented by able counsel, did not request the Appellate Division to amend its remittitur so as to indicate the basis of the court's decision, a common practice in New York. New York Civil Practice Laws and Rules, Rule 5524. *See, e.g. People* v. *Schwartzman,* 24 N.Y.2d 241, 299 N.Y.S. 2d 817, remittitur amended 24 N.Y.2d 914, 301 N.Y.S. 2d 644, *cert. denied,* 396 U.S. 846 (1969). In such circumstances this Court has held that it has no jurisdiction if "it appears that the judgment [of the state court] might have rested upon a non-federal ground • • •." *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).

Thus, the Appellate Division may not have reached the merits of Camaj's claim, but, rather, rejected it on the basis of the independent and adequate state ground urged by the People.

Certainly a state court's insistence upon the enforcement of a procedural rule requiring the appellant to file an adequate record upon which to decide his appeal serves legitimate state interests. *Henry* v. *Mississippi,* 379 U.S. 443, 446-7 (1965).

B. Camaj's contention does not warrant review by this Court.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court held that a delay more than twice the length of delay in this case was justified and that the petitioner had not been deprived of his right to a speedy trial. No *per se* rule exists. The length of the delay is only one factor to be considered by a court in ruling on a speedy trial claim. The others are: "the reason the government assigns to justify the delay," "the degree of the defendant's assertion of his right," and the "prejudice to the defendant" caused by the delay. *Barker* v. *Wingo, supra,* at 531-2. Of course, to the extent that the delay is attributable to the defense, and not to the prosecution or the courts, these factors need not even be considered, for such conduct on the part of the defendant constitutes a waiver of his Sixth Amendment right to a speedy trial. *Barker* v. *Wingo, supra,* at 529.

Here, 18 months after his indictment, Camaj moved to dismiss the indictment for lack of a speedy trial. In support of his motion, he cited only the lapse of time since his indictment. He did not allege prejudice he did not allege that the People or the Courts were responsible for the delay; he did not allege that he had demanded a speedy trial. Camaj's claim that he objected to the nine adjournments prior to his motion (Petition at 24), is not supported by the record. Indeed, for all that can be determined from the record that he presented to the Appellate Division, Camaj may have requested each delay.

Camaj's conclusory motion, citing only a less than two-year delay, fails to raise a substantial federal question.

POINT III

Camaj's claim that the trial court erroneously failed to dismiss the indictment because of the absence of evidence corroborating the "accomplice" testimony does not involve a federal question.

Camaj argues that the People failed to corroborate the testimony of Camaj's accomplice, Johanna Leonardi. Camaj's argument is based exclusively on New York's requirement that "a defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence to connect the defendant with the commission of the offenses." New York Criminal Procedure Law (McKinney's) §60.22(1). He does not claim that the People's failure to corroborate Leonardi's testimony violates any right, title, or immunity under the federal constitution.

He thus raises no federal issue, and there is no question for this Court to consider.

Conclusion

The petition should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
GERALD M. LABUSH
Assistant District Attorneys
Of Counsel

October, 1975